(6)

No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, consistent with the filed rate doctrine, a carrier can enforce an incomplete tariff that is inapplicable by its own terms and void by operation of law.

STATEMENT PURSUANT TO RULE 29.1

Parent Company

Kmart Corporation (MI)
Divisions:
Kmart
Kmart Fashions
Super Kmart

Major Subsidiaries

Borders, Inc. (DE)
Builders Square, Inc. (DE)
Huck Fixture Company (IL)
Kmart Canada Limited (Canada)
JAF, Inc. (DE)
Kmart Properties, Inc. (MI)
OfficeMax, Inc. (OH)
PACE Membership Warehouse, Inc. (CO)
PayLess Drug Stores Northwest, Inc. (MD)
The Sports Authority, Inc. (DE)
Walden Book Company, Inc. (NY)
MAJ a.s. (CZ)
Kmart CR a.s. (CZ)
Kmart SR a.s. (SL)
Kmart Services s.r.o. (CZ)

Other Kmart Subsidiaries

Big Beaver of Caguas Development Corporation (MI)
Big Beaver of Caguas Development Corporation II (MI)
Big Beaver Development Corporation (MI)
Big Beaver of Carolina Development Corporation (MI)
Builders Square Limited (UK)
Canton Provision Company (MI)

STATEMENT PURSUANT TO RULE 29.1 – Continued

ILJ, Inc. (AK)
KLC, Inc. (TX)
KM Holding Company (MD)
Kmart Apparel Leasing Corp. (NJ)
Kmart Apparel Service of Atlanta Corp. (GA)
Kmart Apparel Service of Des Plaines Corp. (IL)
Kmart Apparel of Puerto Rico Corp. (PR)
Kmart Apparel Service of Sunnyvale Corp. (TX)
K mart Far East Limited (Hong Kong)
K mart Limited (UK)
Kmart International Services, Inc. (DE)
Kmart Pharmacies, Inc. (MI)
Kmart Trading Services, Inc. (MI)
Kmart Travel Services, Inc. (MI)
Kresge Foreign Sales Corporation (Barbados)
Media Momentum, Inc. (MI)
OfficeMax Limited (UK)
PACE Membership Warehouse Limited (UK)
PayLess Drug Stores Limited (UK)
PMB, Inc. (TX)
S. S. Kresge Company (MI)
S. S. Kresge Company (Australia) Pty. Ltd. (Aust.)
Sourcing and Technical Services, Inc. (FL)
STI Merchandising, Inc. (MI)
The Sports Authority International Limited (UK)
Walden Book Company Limited (UK)

Other Equity Holdings

K mart Holdings Pty., Limited (Aust.)
Coles Myer Limited (Aust.)
Independent Holdings Limited (Aust.)
K mart Overseas Corporation (NV)
Coles Myer Limited (Aust.)

STATEMENT PURSUANT TO RULE 29.1 –
Continued

K mart Holdings (New Zealand) Limited (NZ)

K mart Taiwan Limited (Taiwan)

Meldisco subsidiaries of Melville Corporation

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1b-24b) is reported at 996 F.2d 1516. The order and decision of the United States District Court for the Eastern District of Pennsylvania granting summary judgment for respondent (Pet. App. 1a-16a) is unreported.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of 49 U.S.C. §§ 10321, 10702(a), 10705(b)(1), 10741, 10761(a) and 10762, and 49 C.F.R. Part 1312 are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

This case forms the latest installment in a trilogy of recent decisions reviewed by this Court involving the "filed rate doctrine" first announced in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), and more recently revisited in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *Reiter v. Cooper*, 113 S. Ct. 1213 (1993).

This case has three distinctive features: (1) application of the filed rate doctrine here adversely affects the *carrier* rather than the shipper; (2) the tariff relied upon by Petitioner was *incomplete* at the time of movement and thus incapable of calculating freight charges; and (3) this case involves two-component *mileage* rates rather than the more traditional rate per 100 pounds. Petitioner's claims are invalid because Riss opted to publish its mileage rates utilizing *two* tariffs and allowed one to expire, thus invalidating the other.

1. The Regulatory Scheme

Under the Interstate Commerce Act, motor common carriers engaged in interstate transportation must publish their rates in tariffs and file them with the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762(a)(1).

The Act authorizes the Commission to "prescribe" the "other information that motor common carriers shall include in their tariffs," *id.*, as well as "the form and manner of publishing, filing, and keeping tariffs open for public inspection." 49 U.S.C. § 10762(b)(1). Carriers "may not charge or receive a different compensation" for their transportation services "than the rate specified in the tariff." 49 U.S.C. § 10761(a).

Those provisions are aimed at facilitating a shipper's knowledge of applicable transportation charges and preventing preferential or discriminatory treatment of transportation users. To achieve those goals, "this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to the collection of the filed tariff." *Maislin*, 497 U.S. at 127. " 'Deviation from [the filed tariff] is not permitted . . . . Shippers . . . are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable.' " *Id.*, quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. at 97 n.9. "This rigid approach was deemed necessary to prevent carriers from" granting preferential treatment through purposeful rate misquotations or other techniques. *Maislin*, 497 U.S. at 127.

Each carrier has the statutory responsibility for establishing its own rates. *See* 49 U.S.C. §§ 10702(a), 10762. A carrier may carry out that responsibility by publishing its rates in individual tariffs or by joining in and incorporating by reference tariff provisions filed by other carriers or agents. To exercise the latter method, a carrier must, under the Commission's regulations, formally participate in the tariff of the other carrier or agent. 49 C.F.R. § 1317.27(e). A carrier may not do that "unless a power of

attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law." 49 C.F.R. § 1312.4(d).

As early as 1939, the ICC warned carriers of the serious consequences of failing to maintain ongoing compliance with tariff participation requirements. *Cancellation of Participation in Agency Tariffs*, 4 Fed. Reg. 4440 (1939) (*ICC 1939 Order*).[1] The Commission there "call[ed] the attention of all interstate common carriers by motor vehicle . . . to their obligations" in this area. Opp. to Pet., App. 3. The Commission advised that "failure of a carrier to pay the established dues of such organization, or to comply with the by-laws, . . . " results in the agent's cancellation of the carrier's participation in the agent's tariff. *Id.* "Such cancellation," the Commission admonished, "makes the use of rates in such tariffs by that carrier unlawful" because the "tariff then becomes incomplete." *Id.* at App. 3-4.

The participation requirement is a logical outgrowth of the statutory responsibility placed on each carrier to establish and file its own rates. *See* 49 U.S.C. § 10762(a)(1). It is designed to insure that a carrier is bound by the rate actions of its agents (including modifications to the referenced tariff) and that it has affirmatively authorized actions on its behalf. "A concurrence or power of attorney fulfills this function" by "demonstrat[ing]" that the carrier "accepts responsibility for, and has participated in any rate changes made by the rate

[1] The ICC's 1939 order is set forth in Appendix C to Respondent's Reply in Opposition to the Petition for Writ of Certiorari ("Opp. to Pet.").

bureau, either directly, through voting, or indirectly through instructing its agent to embrace the changes for its account." *Wonderoast, Inc. – Transp. Systems International, Inc.*, 8 I.C.C.2d 272, 278 (1992), aff'd *sub nom. Lovett v. Wonderoast*, 145 B.R. 40 (Bankr. D. Minn. 1992). "A power of attorney or concurrence provides the necessary link," under the statutory scheme, between the carrier and entities acting on its behalf in establishing and modifying tariff charges. *Id.*

2. Mileage Rates

In general, there are two types of rates: weight based and mileage based. Weight-based charges have traditionally been the most prevalent type of rate. From the carrier's standpoint, they consist of a single element – the charge per unit of weight (usually 100 lbs.). The *shipper* is then required to state on the bill of lading the second element needed to compute the freight charge – namely, the weight of the shipment. (Cents per 100 lbs. x weight = freight charge.)

By contrast, mileage rates, which began being used with greater frequency with the increased rate-making flexibility introduced by the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), require the *carrier* to publish two distinct but interdependent components: the rate per mile and the distance between the origin and destination. To obtain the charge for a transportation movement, the two components are multiplied together (rate per mile x distance = freight charge). Consequently, a carrier can effectively change the applicable freight charge by altering either element of the equation.

As the court below noted, when a carrier elects to file a mileage-based rate, "it must provide both components to allow a shipper to calculate transportation costs for a given shipment. If a tariff is incomplete because one or the other of these components is missing, the shipper cannot put the tariff to its intended use." Pet. App. 7b. Thus, publishing one component of a mileage-based rate without the other is meaningless.

The ICC's tariff regulations prescribe three alternative methods of publishing the distance component of a mileage rate: (1) by attaching a map to the tariff, (2) by listing specific distances between each set of origins and destinations, or (3) by participating in a separately published standardized distance scale, commonly known as a mileage guide. 49 C.F.R. § 1312.30(c)(1). A distance scale or mileage guide is itself a tariff that must be filed with the Commission. *Jasper Wyman & Son – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246, 251 (1992). It is usually published by an agent on behalf of a large segment of the motor carrier industry due to the substantial cost of compiling and updating highway mileages for truck routes.

When a carrier chooses to publish mileage rates and to refer to a filed mileage guide tariff for distances, its participation in that tariff is mandatory to prevent discrimination. A carrier participating in a mileage guide tariff must apply the published distances in effect on the date of movement rather than actual miles travelled. Otherwise, it would be able to grant preferential treatment to favored shippers by computing lower rates based on shorter routes. Moreover, distances between the same origins and destinations vary among guides, (and even

between different editions of the same guide), because of route variations between different mileage publications, changes resulting from new highway, bridge and tunnel construction, completion of and construction on the Interstate Highway System, and other developments.

Under the Commission's regulations, it is vital that a carrier relying on a standardized distance scale keep a concurrence or power of attorney in effect to ensure continuing participation in the mileage guide. Consistent with long-established principles, if the carrier lets the concurrence or power of attorney lapse, thereby causing its participation in the distance tariff to be canceled, its mileage tariff "then becomes incomplete" (*ICC 1939 Order*) and thus "void as a matter of law." 49 C.F.R. 1312.4(d).

3. This Case

In 1984, Petitioner, Security Services, Inc. f/k/a Riss International Corporation (Riss), elected to publish mileage rate tariff 501-B, which referred to an agent's mileage guide tariff as the source of standardized distances between all points that the carrier served. J.A. 27. That tariff, the Household Goods Carriers' Bureau (HGB) Mileage Guide Tariff No. ICC-HGB 100, contained a prominent note at the outset that precluded use of the distances published therein by carriers not listed in its Participating Carrier and Scope Tariff No. ICC HGB 107-A. The note stated:

> NOTE: THIS MILEAGE GUIDE MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR

> THE PURPOSE OF DETERMINING TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE UNLESS CARRIER IS SHOWN AS A PARTICIPANT IN THE ABOVE NAMED TARIFF.

J.A. 35.

Although Riss was listed as a participant in HGB 100 when it originally published mileage rate tariff 501-B, Riss was canceled from HGB 100 effective February 19, 1985, because of its apparent failure to pay the required participation fee for that year. *Security Services, Inc. f/k/a Riss International, Inc. v. K Mart*, Pet. App. 15b. The HGB effectuated the cancellation through publication of Supplement No. 17 to the HGB 107-A Tariff. J.A. 13-19. The supplement listed Riss with the symbol # beside its name. The notes to the tariff provided the following explanation:

> # – Cancel carrier's participation. For application of rates, rules or other tariff provisions, see tariffs lawfully on file.

J.A. 24. Consistent with the express terms of the "Note" in the mileage guide tariff, Riss was no longer a participant in HGB 100 as of February 19, 1985. From that date forward, Riss' mileage rates, although remaining on file with the ICC, were incomplete because they were incapable of calculating freight charges and thus void under Commission's regulations.

"On April 17, 1986, Riss and K Mart entered into a contract under which Riss agreed to transport goods on behalf of K Mart and K Mart agreed to pay for Riss' services at the rates specified in the contract." Pet. App. 3b. Riss' contract rates were lower than the common carrier mileage rates that had become void under the Commission's regulations more than a year earlier.[2] Riss performed transportation services under the contract from November 1986 through December 1989, and K Mart compensated it in accordance with the contract rates.

In November 1989, Riss filed a chapter 11 bankruptcy petition. Pet. App. 4b. After undergoing a corporate reorganization, the debtor-in-possession, Security Services, renounced the contract with K Mart and filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania to collect the difference between the negotiated contract rates and Riss' common carrier mileage rates. The amount sought in this case is $465,000 plus interest, but this issue is of "industry-wide importance" because numerous other common carriers are seeking many millions of dollars in additional freight charges based on tariffs which are similarly void as a matter of law due to the carriers' failure to participate in agents' tariffs.[3] *See, Jasper Wyman & Son*, 8 I.C.C.2d at 247.

4. Proceedings Below

The District Court granted summary judgment for K Mart. It reasoned that "[i]n essence, in this case there was

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[2] Although K Mart asserted the existence of the contract as an affirmative defense, the District Court ruled that the ICC had primary jurisdiction over that issue as well as the unreasonableness of the rates, and ruled only on the validity of Riss' mileage rate tariff. Pet. App. 3b n.1.

[3] See Appendix B, *infra*, for a list of such carriers. Several Circuit Courts of Appeals have stayed similar appeals pending this Court's decision herein. See Appendix C.

no filed tariff . . . upon which a computation of the [alleged] undercharge could be made." Pet. App. 12a. In the district court's view, the carrier's "reference without participation in the mileage guide" was "ineffective, and therefore there was no effective filed tariff as to the mileage charges." Pet. App. 13a. It rejected the argument that "the Riss tariff substantially complied with ICC tariff requirements and therefore are fully enforceable" as "akin to an equitable argument[,]" which under *Maislin*, has no place in the "rigid" world of the filed rate doctrine. Pet. App. 12a.

The Third Circuit affirmed. It noted that, "[u]nder the relevant law, Riss' tariff was void when K Mart made its shipments in 1986 through 1989 because any power of attorney it previously may have issued became ineffective in 1985, 49 C.F.R. § 1312.4(d), and a void tariff cannot support the undercharges." Pet. App. 15b. Because the Court of Appeals viewed § 1312.4(d) as operating "to declare a tariff retroactively void," it believed that the validity of the remedy in this case had to be evaluated in light of the two-pronged test of *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 367 (1984). Pet. App. 17b-18b. That test permits the Commission to reject retroactively a filed tariff that has gone into effect only when it "further[s] a specific statutory mandate" and is "directly and closely tied to that mandate." *ICC v. ATA* at 367.

The Third Circuit concluded that the Commission's void-for-nonparticipation rule satisfies both prongs of the test. First, the rule "furthers a specific statutory mandate by furthering the disclosure of the identity of carriers participating in governing separate tariffs." Pet. App.

19b. Second, the rule provides a simple and straightforward way of promoting compliance with the statutory mandate of open disclosure of carrier participation in the tariff schedules of others. Pet. App. 19b-20b.[4]

SUMMARY OF ARGUMENT

1. The filed rate doctrine requires strict application of filed tariffs. It applies equally to carriers and shippers. A tariff which, by its own terms, has no application to a carrier on the date of movement may not be used by that carrier to collect additional freight charges because it

[4] Effective Dec. 3, 1993, Congress enacted legislation to provide partial relief from undercharges, the Negotiated Rates Act of 1993 (NRA), Pub. L. 103-180, 170 Stat. 2044. However, this new law does not address the sole issue before the Court in this case. It would apply to the claims against Respondent only if the Court were to reverse the decision below. In that event, Respondent's other affirmative defenses of contract carriage and Riss' unreasonable rates and practices would be available. The NRA codifies case law recognizing the Commission's primary jurisdiction over contract carriage disputes (Sec. 8). With respect to shipments made prior to September 30, 1990, the NRA permits the Commission to find it to be an unreasonable practice to collect the difference between its negotiated rate and its tariff rate under limited circumstances (Sec. 2(e)). It also prescribes criteria to be applied by the Commission in determining the reasonableness of past rates sought by non-operating carriers (Sec. 2(g)). In the case of an incomplete tariff, however, none of these issues need be reached. They simply provide additional grounds on which an undercharge claim might be rejected if a carrier otherwise had a filed rate in place at the time of the shipments at issue.

does not embody a "filed rate" applicable to that movement.

A carrier electing to use mileage rates must publish both the rates and a standardized distance scale in a filed tariff. One without the other is not enough to permit a shipper or carrier to calculate the applicable freight charge. Riss initially filed a mileage rate tariff that incorporated by reference a distance scale published by its duly authorized agent, the Household Goods Carriers' Bureau. The distance scale tariff listed Riss as a participating carrier, and accordingly gave constructive notice of the applicable mileage for movements under Riss' mileage rate tariff.

When Riss stopped paying its required participation fee to its agent in 1985, the agency relationship ended and Riss' participation in the HGB mileage guide tariff was canceled. A supplement to the mileage guide tariff expressly noted that Riss had been canceled and removed Riss from the list of participating carriers. The mileage guide tariff also gave prominent notice that the mileages applied only to carriers listed as participants in the tariff. As of 1985, therefore, the transportation community, including both Riss and its auditors, had constructive notice that the HGB distance scale no longer applied to Riss' mileage rate tariff.

From that date forward, Riss had no effective tariff on file. The shipments at issue here, which took place between 1986 and 1989, were therefore not subject to a filed rate. No shipper who consulted the tariffs on file with the ICC would have been able to compute a freight charge because there was no effective distance scale

applicable to these shipments. Riss' tariff was as incomplete and ineffective as if it had expired by its own terms. A piece of paper with the word "tariff" on it may have been on file, but a strict application of its terms, as required by *Maislin*, would not have yielded an applicable rate. Tariff debris cannot qualify as a filed rate.

The ICC has properly provided since 1939 that a carrier can incorporate a tariff by reference only if it participates in that tariff through a binding agency relationship. The Commission's regulations serve the important statutory purpose of preventing discrimination among competing shippers. In the absence of a filed and applicable distance scale providing standardized distances, a carrier would be free to reduce its freight charges for a favored shipper by calculating the mileage differently. Under Riss' tariff, for example, the carrier would have been able to adjust its freight charges for some movements by $73 per truckload simply by changing the distance between two points by a single mile. The regulations quite properly provide that a mileage rate tariff that does not include an applicable and effective distance scale is void as a matter of law.

The tariff on which Riss relies for its undercharge claim was ineffective on its face, void under controlling ICC regulations, and void under the filed rate doctrine. Petitioner has thus failed to sustain its threshold burden of proving the existence of an effective tariff upon which to base its claims, and they must fail.

II. *ICC v. American Trucking Ass'ns*, 467 U.S. 354 (1984), has no bearing on this case. At issue there was whether the ICC is empowered to reject an effective tariff

retroactively. There is no element of retroactivity involved here. Unlike the remedy at issue in *ATA*, under which rejection of a tariff rendered it "void *ab initio*" to the date of its original filing, the tariff at issue here became ineffective and void *prospectively* on the date of Riss' cancellation from the HGB mileage guide. *Id.* at 358. Both Riss and its shippers had notice from that date forward that there was no effective tariff on file. The effect was prospective only – no shipment prior to the date of cancellation was affected in any way.

ATA applies, moreover, only in the case of complete and effective tariffs. The decision does not protect a tariff like the one at issue here, which became incomplete and ineffective by its own terms when Riss' participation in the HGB mileage guide terminated.

Even if *ATA* were applicable, the ICC's regulations voiding Riss' tariff would satisfy the test that the Court applied in that case. Prospectively voiding an incomplete mileage rate tariff is "directly and closely tied" to the "specific statutory mandate" of enforcing the filed rate doctrine. 467 U.S. at 367. The regulations provide important protection against discrimination by ensuring that carriers using mileage rates have a binding and effective distance scale on file in a tariff.

ARGUMENT

I. THE FILED RATE DOCTRINE PRECLUDES ENFORCEMENT OF A TARIFF THAT BY ITS OWN TERMS DOES NOT APPLY AND THAT BECAME VOID UNDER CONTROLLING REGULATIONS BEFORE THE SHIPMENTS AT ISSUE

A. Riss Impermissibly Seeks to Enforce a Tariff That Is Inapplicable by Its Own Terms

Where a carrier seeks to enforce a tariff, it must show that the tariff is applicable to the transportation movement at issue. Here, Petitioner cannot make that showing. The distance scale tariff that it seeks to enforce is inapplicable by its own terms. Riss' effort to collect additional charges based on that tariff must therefore fail.

Riss filed a mileage-based tariff, (No. 501-B, J.A. 25-34), containing a scale of freight charges graduated by "rate base numbers," J.A. 30-32, which were based on the distances between the origins and destinations to be served.[5] Standing alone, however, that mileage rate tariff did not permit the computation of a freight charge. Such a charge could be computed only by reading the mileage rate tariff in conjunction with a separate distance tariff. Here, Riss did not publish its own distance tariff but

[5] "The Rate Base Number as used in this section is to be interpreted as meaning 'Mile'. Rate Base Numbers (mileage) will then be determined by use of the Mileage Guide No. 12, ICC HGB 100 Series, Household Goods Carriers' Bureau, Agent." J.A. 33.

rather joined in a standardized mileage tariff, HGB Mileage Guide Tariff 100.[6]

The difficulty for Riss, however, is that, during the period in which the transportation movements at issue occurred, the HGB mileage guide tariff by its terms was inapplicable to Riss. As noted earlier, HGB No. 100-A conspicuously stated that it applied only to the participating carriers listed in the HGB Participating Carrier and Scope Tariff No. 101-B (later reissued as HGB 107-A). The Tariff read:

> **PARTICIPATING CARRIERS**
>
> For a list of participating carriers refer to "Participating Carrier and Scope Tariff No. ICC HGB 107-A, Household Goods Carriers' Bureau, Agent, Supplements thereto or reissues thereof.
>
> NOTE: This mileage guide may not be employed by a carrier as a governing publication for the purpose of determining transportation rates based on mileage or distance unless carrier is shown as a participant in the above named tariff.

That tariff specifically lists "mileage guide participants." As of February 1985, the tariff plainly indicated that Riss'

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[6] The Household Goods Carriers' Bureau (HGB) Mileage Guide Tariff No. 100-A, J.A. 27.

As an aid to the court, in view of the unusual size and nature of this tariff, Respondent has lodged with the Clerk of the Court a copy of the entire HGB Mileage Guide Tariff No. 100-A to which reference is made herein.

participation had been canceled. J.A. 14. As a consequence, after that date the mileage guide tariff, HGB No. 100-A, was no longer applicable and, by its own terms, could "not be employed" by Riss "for the purpose of determining transportation rates based on mileage or distance." J.A. 35.

Riss' effort to enforce distance tariff HGB No. 100-A for shipments transported from November 1986 through December 1989 – a period well after the tariff's applicability ceased – must be rejected. Enforcing a tariff that by its own terms is inapplicable would squarely conflict with this Court's admonition that "strict adherence" to tariff terms is an absolute requirement of the filed rate doctrine. *Maislin*, 497 U.S. at 132.

Moreover, as the Court below noted, the filed rate doctrine "charges carriers and shippers alike with constructive knowledge" of the terms of filed rates. Pet. App. 14b. Thus, knowledge of a tariff's contents (or absence of provisions) is "conclusively presumed." *Maislin*, at 127, n. 9. As stated by this Court in *Maxwell*,

> This rule is undeniably strict and it obviously must work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Maxwell, 237 U.S. at 97. See also *Maislin*, at 128: "Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it." Therefore, this rule deprives Riss of additional revenues from anticipated undercharge claims, but Riss and its auditors are charged with constructive notice of Riss' tariffs. Since Riss is depending on

the filed rate doctrine as the basis for its claims, it cannot complain if a strict application of that doctrine *voids* its claims.

In sum, Petitioner cannot collect charges based on a tariff that is inapplicable. The HGB distance tariff referred to in the mileage rate tariff that Riss published (No. 501-B) cannot be used to compute freight charges in this case. Without the distance tariff, Riss does not have the necessary tariff components to support the charges that it seeks to collect. The terms of the tariff on which Petitioner here relies are themselves sufficient to defeat the undercharge claim.

B. The Tariff Became Void by Operation of Law When Petitioner Allowed Its Power of Attorney to Lapse and Was Deleted from the Mileage Guide Tariff

Petitioner's undercharge claim is also meritless because it seeks to enforce an incomplete tariff that, under longstanding ICC regulations, is void. Those regulations govern how carriers must publish mileage rates and participate in joint tariffs, such as the HGB Mileage Guide Tariff, if they choose this method of publication. According to the ICC, approximately 12,800 motor carriers refer to the HGB Mileage Guide for distances to compute freight charges.[7]

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[7] *See United States' Petition for Rehearing*, August 1993, n.7, filed in *Overland Express, Inc. v. Interstate Commerce Commission,,* 996 F.2d 356 (D.C. Cir. 1993).

Under those regulations, a carrier choosing to refer to a separate distance tariff must formally participate in that tariff. 49 C.F.R. § 1312.27(e). It cannot do that unless it executes a power of attorney showing that it agrees to be bound by its agent's actions. 49 U.S.C. § 1312.4(d). Revocations or amendments of the power of attorney are reflected through tariff revisions. 49 C.F.R. § 1312.10(a). Absent an effective power of attorney, a mileage-based tariff is void as a matter of law. 49 U.S.C. § 1312.4(d).

Only distance guide tariffs officially on file with the Commission may be referred to by carriers. 49 C.F.R. § 1312.30(c)(4). Moreover, the agent or carrier issuing the mileage guide tariff must publish a list of participating carriers. 49 C.F.R. § 1312.13(c). The title page of the participating carrier's tariff shall state that it applies only in connection with tariffs referring to it. 49 C.F.R. § 1312.25(a). When a carrier's participation in an agent's tariff is canceled, all reference to the carrier shall be eliminated. 49 C.F.R. § 1312.25(d); § 1312.18.

The Commission's regulations implement the filed rate doctrine by requiring carriers to be named in an agent's tariff publishing a necessary component of the carriers' mileage rates. These regulations assuredly were not promulgated as a defense to undercharges. As noted earlier, the Commission more than 50 years ago warned carriers about the dire effects of being canceled from an agency tariff for failure to pay the required participation fees. The I.C.C.'s *1939 Order* was in response to many "unwitting violations of the law" resulting from cancellations of participation in agency tariffs during the early years of motor carrier regulation which began in 1935. It warned that failure to pay the dues of agency tariff

bureaus results in the cancellation of the carrier's participation in the agency tariff and that such cancellation makes the tariff "incomplete." Continued use of those rates would be unlawful.

From the very beginning of tariff regulation, the I.C.C. required carriers that opted to refer to an agent's tariff to also participate in it. 49 C.F.R. § 1312.27(e). The HGB incorporated this requirement into its Mileage Guide by prominently publishing the notice reproduced at page 16 herein. Moreover, when the ICC becomes aware of carrier noncompliance, it reacts.[8]

In 1984, the Commission revised its tariff regulations to simplify tariff procedures, *Revision of Tariff Regulations, All Tariffs*, 1 I.C.C.2d 404 (1984). The Commission explained that the 1984 revision of its tariff regulations merely removed redundancies. Due to copyright issues, the Commission refused to preclude any mileage guide publisher from filing its guide with the Commission, or to

[8] *See New England Motor Carrier Rates*, 8 M.C.C. 287, 304 (1938) (prohibiting use of tariff without participation); *Halliburton Co. v. Consolidated Copperstate Lines*, 335 I.C.C. 201, 107 (1969) (lack of participation in the tariff operated to defeat an undercharge claim); *Household Goods Carriers' Bureau, Inc. – Petition for Cancellation of Tariffs of Non-Participating Carriers*, 9 I.C.C.2d 378 (1993) (order directed at 111 carriers identified by HGB as referring to, without participating in, the HGB Mileage Guide Tariff); *National Motor Freight Traffic Association – Petition for Cancellation of Tariffs That Refer to the N.M.F.C. Classification, But Are Filed By or On Behalf of Non-Participating Carriers*, 9 I.C.C.2d 186 (1992) (same as to 49 carriers identified as referring to, but not participating in, a commodity classification tariff filed by the National Motor Freight Classification Committee).

deny any carrier's right to participate in any filed mileage guide of its choosing. *Id.* at 252. The Commission's explanation of its 1984 revision is clearly rational, particularly in light of the fact that it *did not repeal § 1312.27(e)* which states that carriers "which refer to . . . separate tariffs . . . shall also participate in those governing separate tariffs . . . ."[9] A repeal of the latter section would have had a devastating effect on the HGB and the publisher of the National Freight Classification, the two most widely referred-to joint tariffs in the motor carrier industry. No carrier would have voluntarily contributed to the cost of these publications if they could merely "refer" to these tariffs without paying annual participation fees.

Petitioner herein must be deemed to have intentionally discontinued its participation in the HGB Mileage Guide Tariff by failing to pay the required annual participation fee, and thus, was canceled from that tariff effective February 19, 1985.[10] From that point forward, Petitioner's mileage rate tariff was incomplete as it lacked an essential component needed to compute the applicable freight charges. Stated in the Commission's regulatory terms, Riss' tariff became "void as a matter of law" when Riss no longer had a mileage guide tariff published in its

[9] *Amicus* Overland's position that "the ICC specifically removed *any requirement* that carriers 'be parties to' distance guides referred to when it promulgated 49 C.F.R. § 1312.30(c)(1)(iii) and (4)" (*Amicus* Overland's Brief p. 16-21) is fallacious, as its position ignores 49 C.F.R. § 1312.27(e). *See Jasper Wyman*, at 251-252.

[10] The HGB considers a power of attorney "dead" if the carrier fails to renew it by submitting participation fees within a reasonable time after cancellation. *K Mart*, at Pet. App. 5b.

name from which freight charges could be calculated. The ICC did not "threaten" to void non-conforming tariffs, as contended by *Amicus*, Overland's Brief p. 16. It emphatically stated, in no uncertain terms, that

> Absent effective . . . powers of attorney, tariffs *are* void as a matter of law.

49 C.F.R. § 1312.4(d) (emphasis added).

Petitioner admits that a mileage guide is a tariff and that "under the ICC's view of its regulations" a "mere reference" to such a tariff without the carrier's participation therein "is not sufficient." Pet. 9, n.4. These admissions contradict Petitioner's position that the rates that Riss now seeks to collect were in "published tariffs on file with the Interstate Commerce Commission." Pet. 4. In truth, Riss published in its tariffs only *one-half* of the mileage rate equation after Feb. 19, 1985, when the claim shipments moved – a scale of charges without a standardized scale of distances. Petitioner can point to no tariff where Riss had published a distance scale *in its own name* after that date as required by § 1312.30(b) and (c)(1).

Consistent with long-established regulatory requirements, Riss' name was properly deleted from the HGB Mileage Guide Tariff. Once that happened, the HGB tariff *was no longer Riss' tariff*. Riss lost, by its own inaction, the required certainty of rates mandated by the filed rate doctrine, and its mileage rate tariff 501-B became void by operation of law. There is no basis for permitting Riss to collect additional charges relying on a void tariff.

C. The Commission's Regulations Achieve the Statutory Goal of Preventing Discrimination

"The ICC regulates interstate transportation by motor common carriers to ensure that rates are both reasonable and nondiscriminatory." *Maislin*, at 119. The ICC's tariff regulation requiring the publication of distance scales with mileage rates is designed to achieve that goal. 49 U.S.C. § 10741. For example, for movements between points for which the HGB Mileage Guide Tariff published a distance of 1001 miles, Item 161 of Riss' Tariff No. 501-B provides a charge of $1828. J.A. 31. In the absence of a tariff publishing standardized distances in Riss' name, Riss could construct a highway route via which the distance between the same two points is only one mile shorter (1000 miles), thereby reducing the charge to $1755, *a savings of $73 per truckload*.[11] Favored shippers could thus receive a substantial preference on each and every truckload to the disadvantage of their competitors by a carrier's manipulation of the routes and distances used to calculate freight charges.[12]

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[11] The difference in truckload charges is $73 between each successive mileage scale (Rate Base Number) block. J.A. 30-32.

[12] *Cf. Regular Common Carrier Conference v. United States*, wherein then Judge Scalia embraced I.C.C. Chairman Taylor's dissent in *Special Tariff Authority No. 84-04859 – Average Rates*, Application No. 3638 (decided Dec. 14, 1984) (unpublished), in striking the nebulous "average rate" rule:

> [T]he proffered rule has been cleverly crafted to permit the forwarder unfettered discretion to secretly propose whatever "average rate" it wishes.

793 F.2d 376, 380 (D.C. Cir. 1986).

Furthermore, distances between two points in the HGB 100 series mileage guide tariff change due to modifications to the Interstate Highway System, new road construction, new bridges, ferries (*Cf. M.I. O'Boyle, Inc. v. United States*, 303 F.2d 446 (Ct. Cl. 1962)), and tunnels.[13] Periodic changes in distances between combinations of two points are, therefore, published in supplements to and reissues of the HGB Mileage Guide. Any changed distances published in the HGB Mileage Guide Tariff must thereafter be utilized by the carriers participating in that tariff for the purpose of computing freight charges between those points; the actual miles traveled are irrelevant.

The Court below recognized the potential for the discriminatory use of mileage rates in the absence of a distance scale published in a filed tariff in the name of the carrier, stating:

> Because the number of miles between two points will vary depending on the route chosen, specification of that number precludes a carrier from favoring one shipper over another by calculating a lower charge for the favored shipper based on a shorter route. This promotes Congress's policy of preventing price discrimination.

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[13] For example, the distances between East Coast points north and south of Norfolk, Virginia, changed significantly when the Chesapeake Bay Bridge and Tunnel was constructed. As a result, all of the distances published in the HGB Mileage Guide Tariff No. 100 series had to be recalculated for movements affected by this new all-highway route.

Pet. App. 7b. This requirement produces a standardization of point-to-point distances.

The reason for this requirement is succinctly explained in *Tri-State Motor Transit Co. v. U.S.*, 490 F.2d 996 (8th Cir. 1974), wherein the court stated:

> Mileage Guide No. 8 when incorporated into the provisions of a Tariff *creates certainty* in the computation of mileage-distance from point of origin to destination. *As provided in the Guide, the determination of mileage made pursuant to its Rules is applicable regardless of the Route actually traveled by the carrier.* The certainty of this method of distance-mileage computation should only be abolished by a clear and specific exception in the terms of the Tariff.

Id. at 997 (emphasis added). As stated in *Tri-State*, the Mileage Guide Tariff also publishes rules[14] regulating the manner in which distances are to be computed when the points involved are or are not "Key Point cities" (green circled points on the HGB maps), (J.A. 36, for example) and when bridges, tunnels and ferries are involved (*See M.I. O'Boyle, supra*).[15] Thus, the distances published in this tariff govern the rates of participating carriers *regardless of the actual routes traveled.*

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[14] J.A. 35 lists only representative rules. For a complete review of the rules for constructing distances, see the original HGB 100-A lodged with the Clerk of Court.

[15] The Court's attention is specifically directed to the "General Purpose of the Mileage Guide" (to establish a uniform method of computing mileages between all points via principal highways suitable for truck travel). J.A. 35.

The ICC's regulations are designed to facilitate conformity with standardized mileage guides and to produce certainty in the computation of freight charges. As the Fifth Circuit observed:

> . . . the Commission is specifically under a statutory mandate to determine what information must be provided in every *joint tariff* and provide mechanisms to ensure that this information is provided and is accurate. Pursuant to this obligation, we believe that there is a strong presumption that *the Commission must require the disclosure of the identity of the carriers participating in every tariff.*

Freightcor Services, Inc. v. Vitro Packaging, Inc. 969 F.2d 1563, 1571 (emphasis added); Accord, *K Mart*, at Pet. App. 18b-19b. The regulations therefore implement and are in furtherance of the filed rate doctrine and the statutory objectives of preventing preferential treatment.[16]

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[16] It ill-behooves Overland Express (*Amicus* Brief, 9) to label the Commission's policies in this case as "bureaucratic nonsense" when Overland is seeking millions of dollars in undercharge claims based on the same policy – the filed rate doctrine. Since shippers are charged with constructive notice of the filed tariffs, it is immaterial whether they must engage in "treasure hunts" for rates. *Cf. Maislin*, 131 n.12. The entire shipping public is charged with constructive notice that Overland, Riss and certain other carriers were not listed as participants in the HGB 100 Mileage Guide Tariff during the periods in which claims were filed. These critical omissions from tariffs prevent the collection of additional charges now claimed from shippers, and rightly so. If these tariff rates which Riss, Overland and others are now claiming had been demanded at the time of shipment, they would undoubtedly have lost the traffic to competitors quoting the market-driven rates initially charged by these carriers. Having enjoyed the revenue from this traffic to the exclusion of their competitors, these carriers and their auditors should not now be permitted to receive the fruits of their unlawful tariffs.

II. PETITIONER'S RELIANCE ON *ATA* IS MISPLACED

A. *ATA* Has No Bearing Here Because There Has Been No Retroactive Rejection Of An Effective Tariff

The main thrust of Petitioner's position is that the ICC's tariff regulations result in an impermissible retroactive rejection of Riss' tariff, citing this Court's decision in *ICC v. American Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984) (*"ATA"*). In *ATA*, this Court considered the validity of a "new remedy" devised by the ICC "to discipline motor carriers for substantial [rate] bureau agreement violations, such as unauthorized collusion or illegal bureau pressure on independent carriers." *Id.* at 357. To remedy such violations, the Commission would "reject the affected tariffs." *Id.* at 358. The "[r]ejection of an effective tariff [would] appl[y] retroactively," "render[ing] the tariff void *ab initio*." *Id.* That would have "serious consequences for affected motor carriers," exposing them to potential "overcharge liability" for "the amount by which the rejected tariff exceeded the prior tariff." *Id.*

The present case is completely different from *ATA*. It involves no retroactive rejection of effective tariffs or the voiding of tariffs *ab initio*. *Id.* Rather, this case involves ineffective tariffs that became void as a result of the

carrier's failure to maintain compliance with pertinent regulatory requirements, and the voiding is from the time of cancellation of participation, not from the original date of filing. Moreover, members of the transportation community had advance notice of the conditions that gave rise to the voiding. As a consequence, the effect was purely prospective. No transportation transaction occurring before the date of cancellation was affected.

Petitioner's argument is premised on the mistaken notion that once a tariff has gone into effect, it cannot be rendered ineffective except through retroactive revocation, thereby triggering the application of *ATA*. But filed tariffs can become ineffective in other ways as well. For example, a tariff may contain an express termination date. After that date has passed, the tariff is no longer effective, not because of retroactive rejection but by operation of its own terms. Similarly, Riss' tariff participation expired, and its tariff became void, by operation of law on a going-forward basis. The prospective operation of a termination date or a legal requirement does not effectuate retroactive rejection.

B. *ATA* Applies Only to Complete and Effective Tariffs Having Technical Defects, Not to Tariffs that Are Incomplete and Legally Void

Petitioner argues that under prior case law, since the ICC accepted Riss' mileage rate tariff for filing, it may not now declare it void by operation of 49 C.F.R. § 1312.4(d). Petitioner's position has no basis in law or fact, as the authorities cited are distinguishable. They involved complete tariffs which were capable of calculating freight

charges, whatever their infirmity under existing law. In addition, they were not subject to any statute or regulation which rendered the tariff void by reason of its defects.

ATA involved complete tariffs on file with the ICC. *ATA* relied on this Court's previous decisions which "stressed the importance of common carriers' being able to rely on *effective* tariffs on file with the Commission." *ATA*, at 364, n.7 (emphasis added). Here Riss' *rate* may have gone into effect in 1983, but after February 19, 1985, Riss had no mileage guide tariff in effect from which distances could be calculated, thereby rendering its rate tariff ineffective.

The other cases relied upon by Petitioner are also distinguishable from the instant case. *Genstar Chemical, Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied sub nom., Nitrochem, Inc. v. ICC*, 456 U.S. 905 (1983), involved the publication of a *complete* rate which was increased 14% rather than the 12% increase authorized by the ICC. *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) involved a *complete* rate filed in violation of the long-and-short haul statute. *Berwind-White Coal Mining Co. v. Chicago & E.R.R.*, 235 U.S. 371 (1914) involved the filing of a complete demurrage charge "sheet" with the ICC which was held sufficient to give notice.[17] Since each of these cases involved *complete* rates from which freight charges could be readily calculated despite their *technical* violations of

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[17] *Berwind-White* was decided before *Maxwell* in which this Court announced the filed rate doctrine.

the Commission's regulations, they are inapposite to the case at bar. Furthermore, unlike the self-executing provisions of section 1312.4(d), the governing order, statute or regulation addressed in these cases did not render the offending tariff void.

Petitioner's rhetoric regarding the ICC's acceptance of tariffs with "irregularities" is to no avail in this case. Since freight charges cannot be calculated with only one half of the equation required by the terms of the tariff, the tariff is incomplete. This is a substantive defect, not a mere technicality. *K Mart* at Pet. App. 22b; *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281 (8th Cir. 1993) at 183; *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 95 (1993). Riss' violation goes to the heart of the filed rate doctrine as embodied in the Commission's regulations, and is distinguishable from the technical, superficial defects contemplated in *Genstar*, *Davis* and *Berwind-White*.

Riss' mileage rates were rendered incomplete and void by its agent's cancellation of a published scale of distances for Riss' account. Carriers are bound by their agents' publication of tariffs made pursuant to an effective power of attorney.[18] Riss failed to sustain its burden

[18] The HGB's power of attorney form referenced by *Amicus* Overland in its Brief at p. 6, and by the D.C. Circuit in *Overland*, specifically binds carriers to the Bureau's acts on their behalf. *Overland*, at 361. It clearly states that the carrier does "hereby ratify and confirm all that said attorney and agent may lawfully do by virtue of the authority herein granted and does (do) hereby assume full responsibility for the acts and failures to act of said attorney and agent." *See, Overland's* Petition for Certiorari, J.A. 143. See copy annexed as **Appendix D** hereto. See also 49 C.F.R. § 1312.10(a).

of proof that it had an effective power of attorney with the HGB after that agent canceled Riss from participation in its Mileage Guide Tariff effective Feb. 19, 1985. Pet. App. 12b. Thereafter, Riss lacked a uniform scale of distances to determine which "Rate Base Number" applied to determine freight ~~charges for a~~ny specific movement. Although the Commission did not strike Riss' tariff following the HGB's cancellation notice, it was not necessary to take any action because Riss' mileage rates became void by their own terms. The Commission's regulations set out the requirement for participation and the consequences of failure to participate. Furthermore, the HGB Mileage Guide Tariff clearly stated the condition for participation. Consequently, there was no retroactive rejection by the Commission. *Atlantis* at 283.[19]

As a practical matter, it would have been extremely difficult, and costly, for the Commission to monitor every cancellation supplement filed by the HGB to determine whether the canceled carriers had filed another method of computing distances simultaneously with their cancellation from HGB 100.[20] As the Court observed in *ATA*, the ICC discontinued scrutinizing every tariff filing in

[19] K Mart submits that the Eighth Circuit's holding that *ATA* need not be invoked when the carrier had no effective tariff upon which to base its claims, is the better reasoned decision. *Atlantis*, at 283.

[20] See, for instance, J.A. 11-19, wherein the HGB's Supplement canceled 52 carriers' participation in the Mileage Guide Tariff effective Feb. 19, 1985. These carriers could have changed their reference to any of the other mileage guides published by the HGB, such as those listed at J.A. 24, the HGB's Zip Code Mileage Guide or other methods of standardizing distances.

1979 due to budget cutbacks and reductions in personnel. *ATA* at 360, n. 4. Given the number of participants in the HGB Mileage Guide Tariff 100 (approximately 12,800),[21] monitoring that tariff alone for cancellations would have been a Herculean task for the Commission and an unacceptable burden on taxpayers.[22] However, this change did not relieve *carriers* of their responsibility to comply with the I.C.A. and ICC's regulations.[23]

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[21] *Amicus* Overland Express' affiant grossly misstates the number of non-participants that referred to the HGB Mileage Guide Tariff as totaling "over 15,000 carriers," based on an unsubstantiated press report estimating that only 40% of the companies using that mileage guide had a power of attorney on file. *Amicus* Brief, App. 9. "Using" a mileage guide is not equivalent to "referring" to that tariff within the meaning of 49 C.F.R. § 1312.27(e). Furthermore, the HGB found only 111 carriers not participating in its mileage guide when it finally took action to police carriers' reference to the guide in their tariffs. See n.8 herein.

[22] The burden to police lawful participation in the HGB Mileage Guide Tariff *was on HGB as the publisher*, not the ICC, as the HGB derives funds for the compilation of its voluminous Mileage Guide from its dues and participation fees. The HGB finally recognized this obligation in 1993 by petitioning the ICC to strike delinquent carriers' tariffs from the ICC's files. See petitions for *Cancellation of Tariffs* cited at note 8 herein. Prior to the Commission's striking of such non-complying carrier's tariffs, those tariffs were incomplete and thus void as a matter of law. *Amicus* Overland's position that the ICC's regulations shifted the burden of enforcement to carriers was properly rejected by the Commission in *Jasper Wyman* at 251-252. (*Amicus* Overland's Brief 12-17.)

[23] See 49 C.F.R. § 1312.1(f): *Carrier liability*. The tender of a tariff and its receipt by the Commission does not relieve the carriers of liability for violations of the Act, other laws *or the Commission's regulations*. (Emphasis added.)

C. Alternatively, *ATA*'s Criteria Are Satisfied by the ICC's Regulations

Even if *ATA* is deemed applicable, the remedy fashioned by the Commission's regulations is clearly in furtherance of its statutory responsibility to enforce the filed rate doctrine, to promulgate tariff publishing regulations and to prevent unreasonable discrimination. This Court held in *ATA* that retroactive rejection of a tariff found to be in violation of the antitrust laws *was* an appropriate remedy when the Commission's discretionary power furthers a specific statutory mandate and the exercise of that power is directly and closely tied to that mandate. *ATA*, at 367.

There can be no dispute over the Commission's discretionary power to reject tariffs containing either defects in form or substance. *ATA* at 359, n. 3. The sole question in *ATA* was whether, after retroactively rejecting a complete tariff, thus finding the tariff to be void *ab initio* (*Id.* at 360), the carriers can be held liable for the entire amount by which their unlawful rates exceed the previous rates, and not just for the resultant damage. *Id.* at 361, n. 5. This Court held that "§ 10762(e) does not license the Commission to reject effective tariffs."[24] *ATA*, at 364. However, the retroactive rejection in that case was within its power to "take actions that are 'legitimate, reasonable and direct[ly] adjunct to the Commission's explicit statutory authority.' " *Id.* at 365. Furthermore,

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[24] Throughout *ATA*, this Court limits its discussion to the retroactive rejection of "effective" tariffs. An *incomplete* tariff has *no* effect since it is incapable of constructing freight charges.

> [t]he doctrine of ICC discretion arose out of a recognition that, since drafters of complex rate-making statutes like the ICA neither can nor do "include specific consideration of every evil sought to be corrected," the absence of express remedial authority should not force the Commission "to sit idly by and wink at practices that lead to violations of [ICA] provisions."

Id.

The question in this case is whether carriers that provided service based on negotiated, unfiled rates in violation of §§ 10761 and 10762 and the Commission's regulations, may later seek additional freight charges based on *incomplete* tariffs. Petitioner respectfully submits that both the filed rate doctrine and the ICC's tariff regulations bar such recoveries. Congress did not envision, when it enacted the Motor Carrier Act of 1980 (Pub. L. 96-296, 94 Stat. 793), that wholesale violations of the filed rate doctrine would ensue.[25] Nor did the Commission anticipate this "evil" when it discontinued its tariff scrutiny practices and relied on carriers to continue to charge only the rates filed in their tariffs as required by law. When these unlawful practices were brought to the Commission's attention, it did not "sit idly by and wink at practices that led to violations of [ICA] provisions." *ATA*, at 365. It properly applied its regulations and ruled

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[25] The Government Accounting Office's Report entitled "TRUCKING TRANSPORTATION – Information on Handling of Undercharge Claims," GAO/RCED-93-208FS, August 1993, reported that 48 of the 290 known bankrupt motor carriers filing undercharge claims are seeking $1.22 billion from shippers. *Id.* at pp. 2, 24. In the aggregate, the total amount being sought by *all* bankrupt carriers is estimated to be $3 billion.

that carriers and their successors had no valid claims. *Jasper Wyman & Son*, at 248.

Riss' position is that any tariff is considered "on file" if it has been sent to the Commission and had not been rejected at the outset. Pet. 16. This is not necessarily true. For instance, a tariff found in the ICC's files which is later admitted to have been fraudulently altered by the carrier's president presumably would have no legal effect.[26] Similarly, a tariff containing rates over which the ICC had no jurisdiction would have no legal effect.[27] Tariffs which have expired by their own terms may be "on file" with the Commission, but are no longer effective. To the same effect would be tariffs which by their own terms are so incomplete that they are incapable of performing their intended purpose – calculating freight charges.

Here, the specific statutory goal met by the Commission's regulations is to enforce the filed rate doctrine and to prevent discrimination when carriers publish mileage rates through the use of an agent's mileage guide tariff (joint tariff), but fail to participate in that tariff, thus leaving the carrier free to use lower mileages for preferred customers than those published in the mileage

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[26] See *U.S. v. L. Robert Tannenbaum*, Criminal No. 92-652 (E.D. Pa.) wherein the President of A-Line, Ltd. was convicted for using a counterfeit ICC tariff acknowledgment stamp to authenticate tariff supplements which he altered and surreptitiously substituted during a visit to the ICC's official tariff file with the intent of validating $17 million in undercharge claims.

[27] Carriers occasionally include in their interstate tariffs rates which apply only on intrastate movements, exempt commodities, water or air movements, and movements within exempt commercial zones.

guide tariff. The Commission's remedy for this patent violation of the filed rate doctrine was to declare the carrier's rate tariff to be "void as a matter of law." Thus, 49 C.F.R. § 1312.4(d) is merely a restatement of the filed rate doctrine – all tariffs relied upon by a carrier must be published in that carrier's name. Thus, the first prong of *ATA*'s two-prong criteria is met.

The Court below concurred in the Fifth Circuit's finding in *Freightcor* that the I.C.C. met the second criterion in *ATA*:

> The ICC regulations prescribe a simple method for compliance with the statute and declare that tariffs that do not comply with important statutory mandates are void. . . .
>
> Although the use of voiding as a method of compliance is potentially a harsh measure, we are satisfied that the Commission has not exceeded its discretion by determining that tariffs are void if they fail to comply with formalities that serve important statutory purposes.

Pet. App. 19b-20b.

This Court was rightfully concerned in *ATA* with exposing operating carriers to overcharges if the Commission were to have the power to reject effective tariffs retroactively. However, that is not an issue when *bankrupt* carriers are retroactively seeking to renounce their negotiated rates and contracts, and apply incomplete tariffs. There is no specter of overcharge claims against defunct carriers.

Contrary to Petitioner's assertion, Congress did not intend to restrict the Commission's discretionary powers

to those provided in 49 U.S.C. § 10762(e). This statute does not require the Commission to reject an incomplete tariff. The statute is merely permissive.

The Court below did not interpret this section as prohibiting the Commission's promulgation of § 1312.4(d). It stated:

> Here, the remedy the ICC adopted under section 1312.4(d) is not the exercise of the power of rejection; rather, it is a remedial power to declare a tariff void from the moment a carrier does not effectively concur or maintain a power of attorney to support its participation in a governing separate tariff. The remedial power in this case is in some respects broader than the remedy examined in *American Trucking*: it not only would apply to void a tariff *ab initio* because an effective concurrence or power of attorney did not exist when the tariff was filed; *it also allows the voiding of a tariff that was originally accompanied by the required concurrence or power of attorney at some later date if the concurrence or power of attorney becomes ineffective.*

Pet. App. 17b (emphasis added). Thus, Riss' tariff 501-B was properly accepted for filing by the I.C.C. on August 20, 1984, as Riss was a participant in the HGB Mileage Guide at that time. When Riss was deleted from HGB 100 effective Feb. 19, 1985, its rate tariff was incapable of computing freight charges, and thus was ineffective and void. Even if Riss had *never* executed a power of attorney, and its name was never in the HGB Mileage Guide Tariff,

the Commission's failure to reject its incomplete tariff could not fill the void created by Riss' omission.

III. THE COMMISSION'S REGULATIONS PROVIDE AN APPROPRIATE REMEDIES FOR INCOMPLETE TARIFFS

Petitioner mischaracterizes the Commission's regulations as a "remedy" for Riss' failure to file a complete mileage rate tariff. Riss had three options for filing mileage rates. 49 C.F.R. § 1312.30(c)(1). Riss opted to use the third alternative by referring to an agent's distance guide tariff, but its participation therein was later canceled. The Commission's tariff regulations merely restate the filed rate doctrine. In the absence of an effective power of attorney, a carrier's name cannot lawfully appear in an agent's tariff and, therefore, its tariff is "void as a matter of law." 49 C.F.R. § 1312.4(d).

The Commission does not express a "claim of authority to reject effective tariffs" through this regulation as alleged by Petitioner. Pet. 17. The Commission's regulations merely state in regulatory detail the warning given to the public in 1939 and in effect for more than 50 years: that if a carrier's participation in an agent's tariff is permitted to lapse, its rate tariff then becomes *incomplete*.[28] An incomplete tariff is incapable of constructing

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[28] The example given in the 1939 Order related to cancellations from the classification tariff, but the principle applies to all references to agency tariffs such as the HGB Mileage Guide. *Wonderoast, Inc. – Transp. Systems International, Inc.*, 8 I.C.C.2d 272 (1992), *aff'd sub nom. Lovett v. Wonderoast, et al.*, 142 B.R. 40 (Bankr. D.Minn. 1992).

freight charges.[29] Courts may not *create* tariff provisions to fill the void created by a carrier's omission since "a federal court has no jurisdiction to enter an order that operates to fix rates." *Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982).

Thus, Petitioner's reliance on Section 10762(e) governing how and when the Commission "may" reject a tariff is irrelevant to the case in hand. Petitioner admits that Section 10762(e) is permissive, (Pet. 17) but without citing any authority nevertheless concludes that it is a peremptory power which, if not exercised when a tariff is tendered for filing, results in the tariff becoming effective. Petitioner correctly describes the procedure for filing and rejecting tariffs, but omits discussion of the consequences of filing *incomplete* tariff matter.

Instead, Petitioner engages in a meaningless discussion of a shipper's remedy through a reparation action. Petitioner has the "cart before the horse." Riss' failure to sustain its burden of proving the existence of an effective tariff must first be adjudicated. *Vertex Corp. – Petition for Declaratory Order – Certain Rates and Practices of Southwest Equipment Rental, Inc. D/B/A Southwest Motor Freight*, 8 I.C.C.2d 701 (1992), 9 I.C.C.2d 688 (1993). The Court below properly granted K Mart's Motion for Summary Judgment. Therefore, reparations is not an issue. Even if it were, *Reiter* has settled the procedure for adjudicating counterclaims.

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[29] In the case of a missing classification, a carrier's class rates are incomplete. In the case of a missing mileage guide tariff, its mileage rates are incomplete.

Petitioner's contention that K Mart "had an opportunity to petition the Commission before the tariff became effective to request the tariff be suspended and investigated pursuant to 49 U.S.C. § 10708," but that it failed to do so, overlooks the fact that *Riss was a participant in the HGB 100 Mileage Guide Tariff when Riss initially filed its mileage rate Tariff 501-B on Sept. 4, 1984.* Therefore, K Mart had no basis for seeking suspension of Riss' 501-B tariff when it was initially filed. When Riss was deleted from the HGB 100 Mileage Guide Tariff one year later, its mileage rates *no longer had any legal effect.* Neither K Mart nor the Commission were required to take any remedial action at that time.

The Court below missed no critical facts as alleged by Petitioner. Pet. 20. On the contrary, Petitioner has misstated the critical fact that Riss' tariff contained only one-half of the required method of publishing mileage rates. "Adherence to filed tariffs is settled law," as stated by Petitioner, but Riss is bound by that strict doctrine as well as its shippers. Petitioner must suffer the consequences of its acts and omissions, which here preclude its claim for additional freight charges.

The filed rate doctrine is a two-edged sword which must be applied strictly against the framer of tariffs (carriers) as well as shippers. Tariffs which are incapable of constructing freight charges are incomplete, and therefore, have no legal effect even when accepted for filing by the Commission. The Courts have neither the statutory authority nor jurisdiction to create rates or provisions missing from filed tariffs. Incomplete tariffs may not lawfully form the basis for undercharge claims.

Accordingly, the Commission's tariff regulations promulgated in furtherance of its statutory mandate to enforce and administer the filed rate doctrine and to prevent unreasonable discrimination were properly applied in *Jasper Wyman* and by the Court below to find that undercharge claims based on an incomplete tariff are without a lawful basis.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 4, 1994

APPENDIX A

STATUTES

49 U.S.C. § 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. § 10702. Authority for carriers to establish rates, classifications, rules, and practices

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall establish-

> **(1)** rates, including divisions of joint rates, and classifications for transportation and service it may provide under this subtitle; and
>
> **(2)** rules and practices on matters related to that transportation or service, including rules and practices on-
>
> > **(A)** issuing tickets, receipts, bills of lading, and manifests;
> >
> > **(B)** carrying of baggage;
> >
> > **(C)** the manner and method of presenting, marking, packing, and delivering property for transportation; and
> >
> > **(D)** facilities for transportation.

49 U.S.C. § 10705. Authority: through routes, joint classifications, rates and divisions prescribed by Interstate Commerce Commission

(b)(1) The Interstate Commerce Commission may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates, and the conditions under which those routes must be operated, for a motor common carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title with another such carrier or with a water common carrier of property.

49 U.S.C. § 10741. Prohibitions against discrimination by common carriers

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. § 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the

rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. **A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.** A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file its minimum rates unless the Commission finds that filing of actual rates is required in the public interest. (emphasis added).

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. . . . (emphasis added).

* * *

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

REGULATIONS

49 C.F.R. § 1312.1(f): *Carrier liability.* The tender of a tariff and its receipt by the Commission does not relieve the carriers of liability for violations of the Act, other laws or **the Commission's regulations.** (emphasis added).

49 C.F.R. § 1312.4(d): *Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. **Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.** (emphasis added). Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

49 C.F.R. § 1312.10(a): *Powers of attorney.* Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. . . . The

power may be as broad or limited as expressed in the document, and alternate agents may be named. **Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if requested by any person.** Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced. (emphasis added)

49 C.F.R. § 1312.13(c) *Participating carriers.* **(1)** (This paragraph does not apply to carriers' local tariffs.) Unless a separate participating carrier's tariff is filed, a list of the participating carriers shall be provided, showing the names of the carriers; the city and state of the principal office of the carrier; and the lead docket number of each carrier's-operating authority, if any.

49 C.F.R. § 1312.18 Supplements

(a) *Changing provisions of a bound tariff.* A supplement may be used to add, delete or change provisions of a bound tariff. General rules, in addition to rules applicable to tariffs as a whole, are provided below.

49 C.F.R. § 1312.25(a) *Separate tariffs may be filed by agents.* (1) An alphabetical list of carriers participating in agent's tariffs, along with a description of the underlying tariffs, may be filed in a separate tariff (not a rate tariff). The title page of the participating carrier tariff shall state that it **applies only in connection with tariffs referring to it.** (emphasis added). If the tariff governs tariffs issued

jointly by two or more agents, it shall be a joint issue (see § 1312.11).

49 C.F.R. § 1312.25(d) *Cancellation of participating carriers.* (1) Except as provided in paragraph (f) of this section, when a carrier's participation in a participating carrier tariff or governed tariff is canceled, **all reference to the carrier in the involved tariff(s) shall be canceled**.

(2) The cancellation may be accomplished either by –

(i) Amending all matter to eliminate reference to the carrier; or

(ii) Publishing a blanket cancellation notice.

The blanket cancellation shall be published in the participating carrier tariff and shall be referred to in the cancellation of the carrier's name. A provision referring to the canceled carrier may not be republished without concurrent cancellation of the reference to that carrier and all matter shall be amended as soon as possible.

(3)(i) In a bound tariff the canceled carrier's name (and reference to the blanket cancellation notice, if used) shall be carried forward as reissued matter in the list of participating carriers.

(ii) In a looseleaf tariff, the carrier's name (and reference to the blanket cancellation notice, if used) and the date the cancellation became effective shall be republished in successive issues of the list of participating carriers until all provisions referring to the carrier are amended. (emphasis added)

49 C.F.R. § 1312.27(e): *Participation in governing publications.* Carriers participating in tariffs which **refer** to,

and are governed by, separate tariffs (classifications, exceptions, rules etc.) **shall also participate in those governing separate tariffs,** unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. (emphasis added)

49 C.F.R. § 1312.30(b): *Method of Showing Distances.* Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a **scale of distances** for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage. (emphasis added)

49 C.F.R. § 1312.30(c): *Determination of distances.* (1) A tariff containing distance rates **shall contain provisions for the determination of distances by** –

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) **Referring to a distance guide(s)**. (emphasis added)

49 C.F.R. § 1312.30(c)(4): Except as provided in § 1312.13(e)(2), **only distance guides officially on file with the Commission may be referred to**. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide. (emphasis added)

APPENDIX B

CARRIERS THAT DID NOT PARTICIPATE IN AGENTS' TARIFFS REFERRED TO IN THEIR TARIFFS AND WHO ARE SEEKING COLLECTION OF UNDERCHARGE CLAIMS

ATF Trucking Co., Inc.
Allegheny Freight Lines, Inc.
American Eagle Lines
BGR Transportation Co., Inc.
Brown Transport Truckload, Inc.
Bulldog Trucking
Canny Trucking Co., Inc.
Casket Distributors
Columbia Navigation
Country Wide Truck Service, Inc.
Cross E Transportation
Emporia Truck Lines
Express Transportation Co.
F.P. Corp.
Freightcor Services, Inc.
J. H. Ware
Mistletoe Transportation
Mitchell Trucking
Northeast Carriers, Inc.
Overland Express, Inc.
R.W. Joyce
Riss International Corp.
Rose Freight Lines
Rose-Way, Inc.
Sam Tanksley Trucking, Inc.
Silvey Refrigerated Carriers, Inc.
Sooner Express
Squaw Transit Co.
Transportation Systems International, Inc.
True Transport Co.
Twin Continental

United Shipping
Winning Run, Inc.
Yowell Transportation Services, Inc.
Zurek Express

APPENDIX C

Decisions Stayed by Circuit Courts of Appeal Pending the Supreme Court's Disposition of *Security Services, Inc. v. K Mart Corporation*

Growe v. Malden Mills Industries, et al., 821 F. Supp. 32 (D.Me. 1993), *appeal docketed*, No. 93-1556 (1st Cir.)

F.P. Corp. v. Golden West Foods, Inc., 807 F. Supp. 1228 (W.D. Va. July 28, 1992), *appeal docketed*, No. 92-2000(L) (4th Cir.)

Security Services, Inc. v. RPL Associates, Inc., No. 91-75705, *held in abeyance* (6th Cir. Dec. 2, 1993)

Security Services, Inc. v. Chemrex, Inc., No. 92 C 4214, 1993 WL 189865, (N.D. Ill. June 2, 1993), *appeal docketed*, No. 93-2632 (7th Cir.)

Security Services, Inc. v. All Freight Services, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,788 (S.D. Cal. May 4, 1992), *appeal filed*, No. 92-55785 (9th Cir.)

Pope v. Amoco Fabrics & Fibers Co., 1992 Fed. Carr. Cas. (CCH) ¶ 83,787 (N.D. Ala. 1992), *appeal docketed*, No. 92-6877 (11th Cir.)

Brizendine v. Golden Dipt Company, 1992 Fed. Carr. Cas. (CCH) ¶ 83,778 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, No. 1:92-CV-2339-GET (N.D. Ga. Sept. 8, 1993), *appeal docketed*, No. 93-9186 (11th Cir.)

Brizendine v. Kumho USA, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,779 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, Civ. No. 1:92-CV-2193-GET (N.D. Ga., Sept. 8, 1993), *appeal docketed*, No. 93-9185 (11th Cir.)

Brizendine v. Richter Distributing Company, 1992 Fed. Carr. Cas. (CCH) ¶ 83,780 (Bankr. N.D. Ga. July 24, 1992), *rev'd*, No. 1:92-CV-2437-GET (N.D. Ga. Sept. 8, 1993), *appeal docketed*, No. 93-9187 (11th Cir.)

APPENDIX D

POWER OF ATTORNEY

*ZIP ONLY**

CANCELLED TARIFF NO. 107**
SUPP. NO. _____ DTD _____
REASON O/B

VAX CANCELLED
APR 4 1989

FA2 No. 1
Cancels No. _

OVERLAND EXPRESS, INC.
(Name of courier)

8651 Naples St., N.E.
(Street address or R.F.D. number)

Blaine, MN 55434
(City, state, etc. and ZIP Code)

Docekt No. MC-133689

November 9, 1984
(Date)

This is to certify that, on the 9th day of November, 1984

OVERLAND EXPRESS, INC.
(Name of courier)

a common carrier of property by motor vehicle does (do) hereby make and appoint Household Goods Carriers' Bureau attorney and agent to publish and file for such carrier freight tariffs, and supplements or loose-leaf page

---

*Italicized materia: handwritten on original.

**Stamped onto original.

amendments thereto, as permitted or required of common carriers of property by motor vehicle under authority of the Interstate Commerce Act, and the regulations of the Interstate Commerce Commission issued pursuant thereto, and does (do) hereby ratify and confirm all that said attorney and agent may lawfully do by virtue of the authority herein granted and does (do) hereby assume full responsibility for the acts and failures to act of said attorney and agent.

OVERLAND EXPRESS, INC.
(Name of courier)

By /s/ Raymond R. Murray
(Signature of authorized person)

President
(Title)

Attest (if a corporation):

_____
(Secretary)

CORPORATE SEAL

Duplicate mailed to:
Household Goods Carriers' Bureau, Agent
3110 Columbia Pike, Suite 200
Arlington, Virginia 22204

_____
(Date)